

Hon. Judge James L. Robart

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

OLD REPUBLIC TITLE, LTD.,

Plaintiff,

vs.

TROY X. KELLEY and DIANE DUFFRIN  
KELLEY, individually and as a marital  
community,

Defendants.

No. 2:10-cv-00038-JLR

**DECLARATION OF TROY X. KELLEY  
IN OPPOSITION TO MOTION FOR  
SUMMARY JUDGMENT**

**NOTE ON MOTION CALENDAR:  
February 18, 2011**

Troy X. Kelley deposes and states:

1. I am one of the defendants in this case, and I have been working in the title insurance industry since 1984. I make this declaration based on personal knowledge about which I am competent to testify.

2. I was the President of United National, LLC, a Washington LLC that did business under the name Post Closing Department ("PCD"). United National was cancelled pursuant to Washington law in August 2008. Among other things, PCD was in the business of providing "reconveyance services," which are tracking and other services associated with making sure that after a loan secured by real property is paid off the title to the property is appropriately cleared. In Washington, this means that the trustee holding the Deed of Trust securing the loan reconveys the property to the borrower and the Deed of Reconveyance is recorded with the appropriate

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1 county officials. This process is critical, because if the Deed of Reconveyance is not executed  
2 and recorded, then the prior loan and Deed of Trust may incorrectly appear as a cloud on title.

3 3. Some title and escrow companies handle their reconveyance tracking and  
4 processing function “in house,” that is, their own internal employees do the work, perhaps as part  
5 of the upfront escrow fee paid by the customer and perhaps as a separate charge. PCD offered  
6 title and escrow companies a way to “outsource” this function. Generally speaking, the title or  
7 escrow company handling the closing would include a line-item charge on the HUD-1 statement  
8 for closing reflecting a fee to PCD, would collect that fee from the borrower on the loan (or other  
9 party), and then send it to PCD for tracking and processing the reconveyance.

10 4. At least in the initial stage, PCD did not deal with the escrow customers.

11 5. PCD’s typical clients were large institutional companies in Washington and  
12 Oregon who have been in the industry for many years and who occupy a large portion of the title  
13 insurance and escrow markets, including Fidelity National Title, First American Title, Stewart  
14 Title, and Old Republic Title. However, PCD did from time to time do work for smaller escrow  
15 companies.

16 6. I have reviewed Old Republic’s Motion for Partial Summary Judgment and  
17 understand that Old Republic claims that the agreement between it and PCD set forth a flat \$20  
18 fee for each reconveyance PCD handled for Old Republic, regardless of the level of services  
19 provided by PCD. Old Republic’s claim is not correct, and is not an accurate statement of our  
20 understanding at the time the agreement was executed or later on.

21 7. The written contract set forth a fee of \$20 for “tracking” reconveyances. But  
22 PCD agreed to do more than simply “track” reconveyances. It also agreed to prepare  
23 reconveyance documents and ultimately obtain the reconveyance. On a day-to-day basis,  
24 obtaining a reconveyance required PCD employees to pick up reconveyance files from the  
25 escrow company, write checks for document recordings and trustee fees, track documents, enter  
26

1 data concerning the closing, escrow and title files, prepare reconveyance documents, contact the  
2 borrower to obtain signatures, review post closing documents for accuracy and completeness,  
3 correct documents when necessary, place phone calls and follow up with lenders and trustees to  
4 facilitate reconveyance recording, record the reconveyance, search county records, contact  
5 county clerks, monitor loan payoff, prepare substitute of trustee documentation, and obtain  
6 letters of lost note if necessary and appropriate and indemnify third parties in those instances.  
7 PCD charged fees for these additional services, such as for preparing lost note documentation or  
8 sending additional faxes, and these charges were reflected on the spreadsheets that PCD sent to  
9 Old Republic and posted on the portion of PCD's website that was accessible to Old Republic  
10 reporting on PCD's reconveyance activities.

11 8. Sometimes, the post closing reconveyance process was easy and quick. More  
12 often, the tasks involved in ensuring that reconveyance activity was completed were laborious  
13 and time-consuming. Under the parties' contract, PCD was responsible for doing whatever it  
14 took to get the reconveyance completed, except for litigation. Given what it would sometimes  
15 cost to obtain a completed reconveyance, PCD would not have agreed to charge only \$20 per  
16 reconveyance for all of that – nor do I think it would be reasonable for Old Republic to have  
17 expected PCD to do so.

18 9. Old Republic knew that that the \$20 fee was not exclusive during the negotiation  
19 of the contract. My original draft of the contract specified that PCD would “receive, track, and  
20 prepare” reconveyance and satisfaction of mortgage documents as necessary, but it specified a  
21 \$20 fee for “tracking” reconveyances. Unless Old Republic expected that PCD was going to  
22 perform the other services for free, it must have known that there would be other fees that were  
23 in fact charged to borrowers on each HUD-1.

24 10. This was confirmed by Old Republic's changes to my documents. In addition to  
25 tracking and preparing reconveyance documents, Old Republic proposed and PCD accepted that  
26

1 PCD also “obtain” the reconveyances and that we would work with lenders and trustees as  
2 necessary to make that happen. Essentially, Old Republic was putting additional burdens on  
3 PCD to make sure that all steps in the reconveyance process were completed beyond merely  
4 tracking whether the reconveyance had been completed. Unless Old Republic expected that  
5 PCD was going to perform these additional services for free, which I find unlikely and  
6 unreasonable, it must have known there would be other fees.

7  
8 11. This was industry practice at the time. Title and escrow companies charged their  
9 customers a single, flat “reconveyance fee” on their HUD-1s. This fee was retained in-house or  
10 sent to a third-party reconveyance service provider. \$20 was a sufficient, initial “tracking” fee,  
11 but it would not a sufficient fee to cover all possible eventualities to complete a reconveyance,  
12 and the industry therefore understood that there would be additional fees. I understood this as  
13 President of PCD, and Old Republic as one of the largest companies in this industry would have  
14 understood it as well.

15 12. I understand that Carl Lago is now taking the position that he and I had a meeting  
16 in April 2006 at which these issues were discussed, based on his notes. I recall this meeting, and  
17 I did not agree at the meeting that PCD’s fees would be limited to \$20 no matter what. I see that  
18 Mr. Lago doesn’t in fact say that I agreed to anything different in his sworn declaration. All he  
19 does is swear to his notes, and his notes don’t even say that I agreed to completely limit PCD’s  
20 fees.

21 13. At all times during the contract period (2006-2008), where PCD performed these  
22 services, additional charges were incurred. Old Republic never objected to this practice during  
23 the life of the contract, even though from the reports we provided they certainly were aware of it.  
24 Our general practice was to post logs to our website that reported our reconveyance activities and  
25 the fees charged. These reports, which I prepared for posting, indicated that PCD was charging  
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1 these additional fees. Old Republic never objected. Unfortunately, because the website was  
2 shutdown after PCD ceased doing business, the posted documents are no longer available.

3 14. I understand that Old Republic claims that they did not in fact have access to the  
4 website. I heard no such complaint during the life of our contract. Any time Old Republic raised  
5 any technical issues with the website our technology employee (Jason Jerue) promptly fixed the  
6 problem. I never heard anyone at Old Republic say at the time that Jason did not in fact fix any  
7 problems they were experiencing. I can't believe that they had no access at all for two years and  
8 never complained.

9 15. I understand that Mr. Lago has testified that the PCD-Old Republic agreement  
10 was never revised or amended. I agree that the contract was not amended to allow PCD to  
11 charge additional fees because the agreement didn't prevent us from charging those fees in the  
12 first place. However, if the contract is initially interpreted to mean that PCD couldn't include  
13 additional charges, then it was amended by our conduct and Old Republic's acceptance to  
14 include those additional charges.

15 16. I understand that Old Republic has pointed to the deposition testimony of two  
16 PCD employees (Amber Murray and Dee Lamb) as evidence that PCD agreed to charge only  
17 \$20 per reconveyance. Old Republic has misconstrued their testimony.

18 17. Amber worked on the Old Republic conveyances, and Dee worked on the Fidelity  
19 reconveyances. However, their work was entirely limited to tracking and processing  
20 reconveyances, such as checking county recording websites, calling lenders for documents, etc.  
21 They did not negotiate PCD's contracts with either Old Republic or Fidelity. They did not deal  
22 with Old Republic or Fidelity personnel with respect to fee or billing issues. They did not handle  
23 PCD's finances. They did not post reporting logs to the website. And they would have had no  
24 idea what was billed to Old Republic or Fidelity by PCD at the end of the day. Nor do I believe  
25 that they testified they did know any of these things.  
26

1           18.     The reason Amber and Dee were primarily aware of the tracking fee is because  
2 that was the original fee entered onto our tracking spreadsheet. That spreadsheet had a column  
3 for the tracking fee, which was the same for each transaction (although it varied by client), and it  
4 had additional columns for other fees as well, which might vary. They could very well state that  
5 the tracking fee was a flat amount that never varied, because in fact it was.

6           19.     I do not believe that either Amber or Dee actually testified that there could be no  
7 other fees in any circumstances. However, if they did their understanding of PCD's contracts  
8 with Old Republic and Fidelity was simply mistaken, which is not surprising because they were  
9 not the personnel negotiating those contracts or dealing with billing issues.

10          20.     During this time, Amber was a full-time college student working part-time at  
11 PCD to earn money for school, making perhaps \$12.50/hr. Meaning no disrespect to Amber, but  
12 it is stunning to me that Old Republic apparently thinks I would have had Amber responsible for  
13 billing on an account of this magnitude.

14          21.     I understand that Old Republic has proffered an email from Jason Jerue in 2007  
15 that referenced a \$20 fee, which is attached to the Frets Declaration. As with Amber and Dee,  
16 Jason was not responsible for negotiating PCD's contracts. Anyway, Jason's email refers to the  
17 "\$20 flat" as the fee for "each DOT to be tracked." He does not say that \$20 is the only possible  
18 fee, just that is the fee for tracking. Nor would he have authority to negotiate the fee.

19          22.     I understand Old Republic has also offered a copy of one of PCD's advertising  
20 brochures, attached to the Smith Declaration, as evidence that our fee could only be \$15. This  
21 brochure obviously doesn't state PCD's contract with Old Republic. For one thing, the tracking  
22 fee in our contract is \$20, not \$15. Moreover, the fee in the brochure is \$15 for "tracking and  
23 processing," while the fee in our written contract is \$20 only for "tracking." I made this change  
24 because I had tried doing the work for a flat \$15 for smaller clients, and I discovered that it was  
25 not a workable business model. Therefore I separated tracking, which could be done for \$15 or  
26

1 \$20, from other processing activities, which could be substantially more time consuming and  
2 costly. Other than an early highly visible client where PCD lost money, and a client who I  
3 dropped after getting the account as quickly as I could, PCD never charged only a small tracking  
4 fee. As is shown in all of the title company client in Washington, additional fees were charged  
5 by PCD directly from the HUD-1 line charges. And as evidenced in all of the title company  
6 clients in Oregon, additional fees were charged by PCD to the title companies who in turn paid  
7 those fees from their reconveyance accounts that were funded solely from the HUD-1 line  
8 charges.

9  
10 23. I understand that Old Republic has also submitted a copy of an email I wrote to  
11 Carl Lago in April 2006 that attached a copy of a “refund letter” for use in refunding money to  
12 customers. Carl Lago specifically asked for a copy of a “refund letter” for his file that would be  
13 available to show his regulator (insurance commissioner) or home office if he was ever asked for  
14 one. The email is not specifically referenced in Old Republic’s motion, so I assume this is some  
15 sort of attempt to sandbag me. This refund letter was a sample of something that we could use in  
16 case a refund was necessary, such as when a mistake was made in transmitting the money or if  
17 we learned that the reconveyance was handled before we got started (such as by the original  
18 lender). Even this draft letter, however, shows my understanding – communicated to Old  
19 Republic – of the difference between merely “tracking” a reconveyance and fully processing it.

20 24. Old Republic makes a number of claims about my position and my deposition in  
21 its motion. These are meritless mischaracterizations.

22 25. Old Republic says that I “admit[] there is nothing in writing to support [my]  
23 position.” I have not admitted that. Above I describe the language in the contract that supports  
24 my position. All I said in the passage in my deposition (Kelley 240:1-9) was that I couldn’t  
25 point to specific language in the written contract that expressly listed the items to be charged and  
26 how much.

26. Old Republic also claims that I “admit[] that [my] claim to be able to charge more than \$20 is not based on any discussion or agreement with Old Republic.” This is false, and Old Republic provides no citation to any portion of my deposition for it. I do claim that PCD’s ability to charge for services beyond the \$20 tracking fee is based on discussions with Old Republic, and was part of PCD’s agreement with Old Republic.

27. Old Republic claims that I “speculated” that Carl Lago must have had an “implicit understanding” about the other fees chargeable by PCD. This is false and an obvious mischaracterization of my testimony designed to mislead the Court. The relevant passage of my deposition states:

Q: Did you have any discussion with Carl that, Oh, by the way, if I have to write a letter or make a phone call, there’s going to be an extra service charge for that?

A: I did mention other service charges, but no, I did not mention any specifics of writing a letter or making the phone call.

Q: Then how would Carl or Old Republic have known that you’re going to charge an extra fee for writing a letter or making a phone call?

A: Again, I have to speculate. But Carl has been at every land title association meeting when those things are discussed, when they set the prices there. They get together and set the prices industry wide. I’m not commenting on whether that practice is legal or not, but that’s what happens.

So what I said was that I had mentioned “other service charges” for reconveyance services to Mr. Lago, but not specifically letter writing or phone calls, and I would have to speculate whether he understood “other service charges” to include those specific items. But Old Republic asserts that the fees weren’t discussed at all, and insinuates that I would have to “speculate” about Old Republic’s understanding about any of them – ignoring the fact that I had just testified that I had mentioned “other service charges.”

28. I believe that Old Republic is only now claiming that we were limited to \$20 because of the class action litigation and Carl Lago’s personal animosity toward me. After the

1 original class action suit was filed, Lago told me that he would drag my name through the mud  
2 and “cost me as much money as he can in litigation.”

3 29. PCD conducted business for its other major clients, including Fidelity National  
4 Title and Stewart, in this manner—a base fee for tracking the reconveyance and additional fees  
5 for additional tasks necessary to complete the reconveyance—and acquiesced in this fee structure  
6 for many years. Neither has raised any complaints about PCD’s business practices, nor have  
7 they sued PCD as Old Republic has done.

8 *I swear under penalty of perjury under the laws of the United States that the foregoing is*  
9 *true and correct.*

10 SIGNED this 11th day of February, 2011, at \_\_\_\_\_, Washington.

11  
12  
13 \_\_\_\_\_  
Troy X. Kelley

**CERTIFICATE OF SERVICE**

I hereby certify that on February 11, 2011, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

Scott A. Smith            ssmith@riddellwilliams.com

William P. Brewer        wbrewer@riddellwilliams.com

DATED this 11<sup>th</sup> day of February, 2011.

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By /s/Darlyne De Mars

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